

IMA:TS:AL:ts

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

COMPLAINT**FILED**
IN CLERKS OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ JUL 5 0 1999 ★

CV-99-4383

- v -

JOHAN MARCH HEWARD,

Defendant.

MISHNER, J.

GENSTEIN, M.

-----X

The United States of America (the "United States"), by its attorney Loretta E.

Lynch, United States Attorney for the Eastern District of New York, Tracey Salmon Smith and Artemis Lekakis, Assistant United States Attorneys, of counsel, by authority of the Attorney General of the United States, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), for its complaint alleges upon information and belief as follows:

NATURE OF THE ACTION

1. This is a civil action brought by the United States pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, et seq. ("CERCLA"). In this action, the United states seeks to recover from the defendant, costs that it has incurred under Section 104 of CERCLA, 42 U.S.C. § 9604, for response actions taken as a result of releases or threatened releases of hazardous substances into the environment at or from a trailer and its contents, including drums containing chemicals, which came to be located in December 1995 on a portion of the American Pallet Company yard, at 171 East Industrial

240174



Court Court, Deer Park, County of Suffolk, State of New York (the "Industry Court Site" or the "Site").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b), and pursuant to 28 U.S.C. §§ 1331(a) and 1345.

3. Venue is proper in this District pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

THE PARTIES

4. Plaintiff is the United States of America. The EPA is an agency of the United States of America.

5. Defendant Johan March Heward is an individual who resides at 97 Broadmoor Lane Rotonda West, Florida 33947 and who, at all times relevant to the complaint, maintained a place of business located at 15754 Dale Street Detroit, Michigan 48223.

THE STATUTORY SCHEME

6. CERCLA was enacted in 1980 to provide a comprehensive mechanism for abating releases and threatened releases of hazardous substances and other pollutants and contaminants and for funding the costs of such abatement and related enforcement activities, including, but not limited to "response actions."

7. "Response actions" are those actions authorized by the President to protect the public health and welfare from any release or threatened release of hazardous substances, pollutants or contaminants into the environment. The definition of "response action" includes,

but is not limited to, "removal," which means the cleanup or removal of released hazardous substances from the environment and such action as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damages to the public health or welfare to the environment, which may otherwise result from a release or a threat of a release. See Sections 101 (23),(25) and 104(a) of CERCLA, 42 U.S.C. §§ 9601(23), (25), 9604(a).

8. Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1) provides, in pertinent part:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. ...

Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1).

9. For CERCLA enforcement purposes, the Administrator of EPA is the President's delegate, as provided in operative Executive Orders. Within certain limits, this authority, including the responsibility for making the determination referred to in Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), has been redelegated by the Administrator of EPA to the Regional Administrators of EPA.

10. The term "release" is defined in CERCLA to include:

any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discharging of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

11. "Hazardous substance," as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), includes hazardous wastes and other chemicals and substances designated under specified environmental statutes and regulations. See 40 C.F.R. § 302.4.

12. Once EPA has determined that there is a release or a substantial threat of release of a hazardous substance at or from a facility that warrants a response action pursuant to Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), EPA may undertake the response action itself and later seek reimbursement from the responsible parties by way of a cost recovery action under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

13. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) provides, in pertinent part, that:

- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,

... from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for - -

- (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan . . .

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned.

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

14. "Person," is defined to include, inter alia, "an individual, firm, corporation, association, partnership, consortium, joint venture, [and] commercial entity." Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

15. "Facility" is defined by CERCLA as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located ...

Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

THE INDUSTRY COURT SITE

16. The Industry Court Site is a trailer and its contents, including drums containing chemicals, which in December 1995 came to be located at the American Pallet Company yard at 171 East Industrial Court, Deer Park, Suffolk County, New York.

17. The drums and chemicals originated from an insolvent metal plating and painting facility in Detroit, Michigan. The trailer had previously been reported as stolen to the local police and upon its recovery was returned to the American Pallet Company yard.

18. The American Pallet Company yard is in an industrial area bordered, within one-quarter of a mile, by a residential area of approximately 2000 residents, an elementary school and approximately 200 businesses. The yard contained drains which discharged directly to groundwater, and there was a public drinking water well and storage tank within 200 feet of the trailer. There was combustible material, including numerous wooden pallets in the yard in the immediate vicinity of the trailer. The yard was not lighted and there was no night time security.

19. The abandoned waste chemicals posed numerous hazards. These included the possibility of leaking or rupturing of the containers by freezing or spillage and the attendant threat of contamination of soil or groundwater; the possibility of fire and uncontrolled combustion of the waste chemicals due to the presence of caustics and acids and possible fuel oil being stored together in an area with large quantities of combustible material, and the attendant threat of toxic fumes impacting the adjacent industrial and nearby residential and commercial properties, and the threat that water run-off from fire fighting activities could have been discharged into ground water; the possibility of direct human contact with the hazardous substances by persons residing nearby, working near or at, or trespassing onto the Site or passing near the Site with the attendant threat of adverse human health effects and damage to the environment. The Site, as all of Suffolk County, New York, is underlain by the Magothy aquifer, the sole source of drinking water for all of Long Island.

EPA'S RESPONSE ACTION

20. On December 27 and 28, 1995 EPA performed an expedited removal assessment at the Site at the request of the New York State Department of Environmental Conservation to determine, inter alia, the need for a removal action under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). At that time, EPA's on-scene coordinator ("OSC") observed evidence of the release and/or substantial threat of release of hazardous substances at or from the Site into the environment. EPA's OSC observed that there were chemical waste drums inside the trailer, stacked two-high, without regard to the compatibility of the chemicals; that the trailer appeared to be damaged from the weight of the chemical waste drums, with its sides bulging and cross supports punching through at the sides; that the trailer was unheated and that a number of the waste drums were either bulging, dented, rusted or missing lids.

21. EPA determined that the drummed waste included industrial chemicals, paints, lacquers, thinners, acid and caustic liquids, and materials in drums labeled "fuel oil." Many of the wastes were substances specifically listed at 40 CFR Part 302 as CERCLA hazardous substances and other waste materials were determined to be CERCLA hazardous substances because of their characteristic of either corrosivity, ignitability or toxicity.

22. On February 2, 1996, EPA issued an action memorandum which documented its determination that there was a release or substantial threat of release of hazardous substances at the Site, determined that the threat of release of the hazardous substances from the Site presented an imminent and substantial endangerment to public health or welfare or the environment, and authorized EPA to conduct a removal response action at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

23. EPA's CERCLA removal response action included staging the drums and sampling and analyzing their contents followed by the disposal of the drums and their contents. EPA's response activities included review of sampling results, confirmation that appropriate disposal had occurred, and other planning and administrative activities. By November 11, 1996, the disposal firms contracted through EPA had notified EPA that they had treated or disposed of the materials from the Site and on November 14, 1996, EPA wrote to the New York State Department of Environmental Conservation and advised them that the removal action had been completed. Thereafter, EPA performed certain administrative activities related to reporting of its activities at the Site, receiving and paying bills and closing out the contracts relating to work at the Site.

24. By letter dated June 14, 1999, EPA notified defendant Johan March Heward that she was potentially responsible, pursuant to Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), to reimburse the United States for the costs of the removal response action taken at the Site, and demanded payment from her of EPA's costs which, at that time were in excess of \$131,680. This letter was received by counsel to the defendant Johan March Heward by July 8, 1999.

COMMON ALLEGATIONS

25. The Site is a "facility" within the meaning Sections 101(9) and 107 (a) of CERCLA, 42 U.S.C. §§ 9601(9), 9607 (a).

26. The defendant Johan March Heward is a "person" within the meaning of Sections 101(21) and 107 (a) of CERCLA, 42 U.S.C. §§ 9601(21), 9607 (a).

27. At times relevant to this action, there were releases or threatened releases of hazardous substances into the environment at or from the Site within the meaning of Sections 101(14), 101(22) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14), 9601(22) and 9607(a).

28. Defendant Johan March Heward arranged for the disposal or treatment of hazardous substances owned or possessed by her at the Site within the meaning of Section 101(29) of CERCLA, 42 U.S.C. § 9601(29), and is therefore a responsible party under Sections 107(a)(3) of CERCLA 42 U.S.C. § 9607(a)(3).

29. As of July 13, 1999, the releases or threatened releases of hazardous substances at or from the Site had caused the United States to incur "response costs," as defined by Sections 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a), of at least \$131,680 plus interest. The United States will continue to incur costs in connection with the Site.

30. The costs incurred by the United States in connection with the Site are costs of a response action incurred by the United States in a manner not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300, under Section 107 (a) of CERCLA, 42 U.S.C. §9607 (a).

CLAIM FOR RELIEF

31. Paragraphs 1 through 28 are repeated and realleged as though fully set forth herein.

32. Pursuant to Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), defendant Johan March Heward as a person "who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at [a]

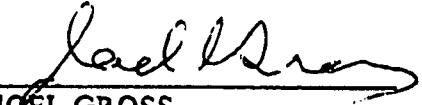
facility ... owned or operated by another party or entity" from which facility there was a release or threatened release of hazardous substances, is liable to the United States for the costs that have been and will continue to be incurred in response to such release or threatened release, including enforcement costs, and interest on all such costs.

PRAYER FOR RELIEF

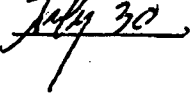
WHEREFORE, Plaintiff United States of America prays that this Court:

1. Enter judgment against the defendant and in favor of the United States, for response costs incurred and to be incurred by the United States in connection with the Site, in an amount to be proved at trial, but totaling at least \$131,680, plus further enforcement costs, and interest thereon.
2. Grant such other and further relief as the Court may deem appropriate.

Dated: Washington, D.C.
July 27, 1999


JOEL GROSS
Chief, Environmental Enforcement Section
Environment and Natural
Resources Division
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

Dated: Brooklyn, New York


July 30, 1999

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

By:


TRACEY SALMON SMITH (TS 4642)

ARTEMIS LEKAKIS (AL 5075)

Assistant United States Attorneys

One Pierrepont Plaza, 14th Floor

Brooklyn, NY 11201

718-254-6039/6096

Of Counsel:

MICHAEL A. MINTZER

Assistant Regional Counsel

U.S. Environmental Protection Agency, Region II

290 Broadway, 17th Floor

New York, New York 10007-1866

(212) 637-3168

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of _____,

19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn New York,

_____, 19____

United States Attorney,

Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the _____ day of _____, in the office of the Clerk of the Eastern District of New York,

Dated: Brooklyn, New York

_____, 19____

United States Attorney,

Attorney for _____

To:

Attorney for _____

Civil Action No. CV-_____

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JOHAN MARCH HEWARD,

Defendant.

COMPLAINT

LORETTA E. LYNCH

United States Attorney,
Attorney for Plaintiff
Office and Post Office Address,
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____

_____ is hereby admitted.

Dated: _____, 19____

Attorney for
TRACEY SALMON SMITH, AUSA
ARTEMIS LEKAKIS, AUSA
(718) 254-6096